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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 937

S. E. C. CORPORATION, formerly known as CANADAY COOLER CO., INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ROLLIN BROWNE,
PAUL VAN ANDA,
Counsel for Petitioner,
30 Broad Street,
New York 4, N. Y.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Plaintiff,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner prays that a writ of certiorari be issued to review the judgment (R. Vol. II, p. 12a) of the United States Court of Appeals for the Second Circuit, affirming the decision of the District Court of the United States for the Southern District of New York (R. Vol. I, p. 35).

Opinions Below.

The opinion of the District Court (R. Vol. I, p. 30) is reported in 140 F. Supp. 717. The *per curiam* opinion of the Court of Appeals (R. Vol. II, p. 11a) is not yet reported.

Jurisdiction.

Jurisdiction to issue the writ prayed for is vested in this Court by Section 1254 of Title 28 of the United States Code. The judgment of the Court of Appeals (R. Vol. II, p. 11a) was entered on February 25, 1957.

Questions Presented.

1. May a trial court in an income tax case disregard a stipulation and concession of the Government and base its decision on findings and conclusions diametrically opposed thereto, without affording the taxpayer an opportunity to introduce evidence to support the discarded stipulation and concession?

2. If the Government's admission be accepted, the only question in the case is whether an investment asset held for the production of rental income becomes an inventory asset "held primarily for sale to customers in the ordinary course of * * * business" solely by reason of the lessor's decision to sell it to the lessee in possession, so that the gain from its sale is taxable as ordinary income rather than as capital gain.

Summary Statement of Matter Involved.

The question of substantive tax law in this case is whether the petitioner taxpayer, which was engaged in the business of buying, leasing and selling water, beer and food coolers, realized capital gains or ordinary income from occasional sales of leased coolers to the lessees in possession.

Ordinary income results from the sale of business assets which are held "primarily for sale to customers." Such assets, if fungible, as were the taxpayer's coolers in this

case, must be carried in an inventory account. All purchases and sales are reflected through charges and credits to the inventory account. Depreciation is never allowed on assets carried in inventory, but changes in values are ordinarily reflected in the annual re-valuations of inventory at cost or market, whichever is lower.

Capital gains result from sales of non-inventory assets and other assets not held primarily for sale to customers. Such assets are carried in a capital or investment account, on which depreciation is allowable, the "basis" of the assets being adjusted by the depreciation allowed or allowable.

In his determination of the taxpayer's tax liability the Commissioner of Internal Revenue treated the taxpayer's leased coolers, while out on lease, as non-inventory investment assets on which depreciation was properly allowable, but ruled that once the taxpayer decided to sell a leased cooler to the lessee it was immediately and thereby transformed into an asset held "primarily for sale to customers" so that the profit on the sale constituted ordinary business income rather than capital gain.

By formal stipulation (R. Vol. I, p. 27; *infra*, p. 9) confirmed by oral statement of its counsel at the trial (R. Vol. I, p. 11; *infra*, p. 10), the Government conceded that the leased coolers while out on lease were non-inventory investment assets on which depreciation was properly allowable.

Nevertheless, the District Court ruled that the leased coolers, even while out on lease, should have been included in inventory (because, although about 95% of the taxpayer's coolers were leased, the Court found that the taxpayer was engaged in a unified rent-or-sell business and therefore all of its coolers must be deemed to have been held at all times "primarily for sale to customers"), and

for that reason gains from sales of leased coolers were ordinary income, not capital gains.

The District Court did not decide the only issue raised by the Commissioner's determination and left open by the Government's stipulation and concession, viz., whether, under the facts of this case, the mere decision to sell a leased cooler transformed it from a non-inventory investment asset into an inventory asset held primarily for sale.

The Court of Appeals affirmed, *per curiam,* on the opinion of the District Court (R. Vol. II, p. 11a).

A very serious consequence of the decision below is the purely fortuitous effect it may have on the taxpayer's depreciation deductions. Although the Commissioner has regularly allowed depreciation on the leased coolers carried in an investment account and the allowance was conceded to be proper, the taxpayer is now faced with an adjudication that the leased coolers were held primarily for sale and therefore must be carried in inventory, *which means that they are not subject to depreciation allowances even while out on lease, as depreciation is never allowable on inventory assets.* Thus, the taxpayer may be deprived of its right to depreciation on 95% of its coolers, the average amount regularly out on lease, although no such issue was joined or even tendered at the trial.

Specifications of Error.

The Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the leased coolers, while out on lease, were includible in inventory.

3. In holding that the leased coolers, while out on lease, were held primarily for sale to customers.

4. In disregarding the Commission's determination and the Government's stipulation and concession that the leased coolers while out on lease were non-inventory assets on which depreciation was properly allowed.

5. In holding that the sales of leased coolers while out on lease resulted in ordinary business income, and in failing to hold that such sales resulted in capital gains.

Reasons for Granting the Writ.

1. In disregarding the stipulation and concession of the Government as to the status of the leased coolers while out on lease, the Court of Appeals has decided a question of federal procedure of great importance in the field of tax practice, in a way probably in conflict with applicable decisions of this Court.

Stipulations are designed to narrow issues and obviate proof of facts not in dispute. They play an especially important and significant part in tax litigation. By the time a tax suit is filed, the Commissioner of Internal Revenue has had full opportunity to examine the taxpayer's returns and also his books and records, has analyzed the facts, considered the taxpayer's arguments, and made a thoroughly informed determination on all the issues involved. In such a situation, it is to be expected that many of the facts can be stipulated and many of the issues conceded. If it were otherwise the federal judiciary would find it even more difficult than at present to dispatch the flood of tax business which ever threatens to swamp it.

The stipulation in this case merely confirmed an official determination which the Commissioner of Internal Revenue had made in his audit of the taxpayer's returns; that the leased coolers while out on lease were non-inventory assets

subject to depreciation allowances. (He allowed depreciation on them up to the moment of sale.) As his determination was presumptively correct, the Government should not have been allowed to challenge it except under an appropriate affirmative plea. Not only was no affirmative plea interposed, but Government counsel at the trial conceded the correctness of the determination which the stipulation already had confirmed.

Even if the trial court had the power to refuse to accept the stipulation and concession as to the status of the leased coolers while out on lease, on the ground that it did not have the force of a judicial admission because it related to a question of law or a mixed question of law and fact (cf. *Swift & Company* v. *Hocking Valley Railway Co.*, 243 U. S. 281), it should have allowed the taxpayer an opportunity to offer proof of evidentiary facts in support of the stipulated point.

In deciding that the determination of the Commissioner which the Government had conceded was correct was, in fact, incorrect, without affording the taxpayer an opportunity to offer proof in lieu of the stipulation, the courts below have turned the stipulation into a trap and have deprived the taxpayer of a fair trial. The trial court's opinion indicates that it was moved to make findings and conclusions in conflict with the stipulation, not so much by contrary evidence in the record as by the absence of confirmatory evidence. Time and again in its opinion the court referred to the taxpayer's failure of proof as justification for its holding that the leased coolers were inventory assets and not capital assets, even while out on lease. The Court said:

> "And there is no evidence that the predominance of rental over sales income was anything but a nor-

mal characteristic of a rent-or-sell business in this industry." (R., Vol. I, p. 33).

"From all that appeared in the evidence, all plaintiff's coolers were held for disposal through whichever outlet materialized first or proved most advantageous." (R., Vol. I, p. 33).

"Plaintiff has not shown that these [leased] coolers were segregated in any way from the rest of its stock in trade." (R., Vol. I, p. 34).

"All the evidence presented indicates that the coolers in issue were an indistinguishable part of a stock in trade held essentially for both sale and lease to customers." (R., Vol. I, p. 34).

It thus is clear that the taxpayer has lost its case because the courts below felt it had failed to prove evidentiary facts sufficient to establish a point which the Commissioner had determined and the Government had conceded he had correctly determined.

The taxpayer at least might have been able to satisfy the Court on that point if it had not been stipulated out of the case. There have been cases involving dual rent-or-sell businesses in which the point has been litigated, and in which the decisions have been in favor of the taxpayers on the basis of evidentiary facts either proved or stipulated. *McCall*, 13 TCM 446; *Crabtree*, 20 T. C. 841; *Baer*, 11 TCM 520; *Browning*, 9 TCM 1061; *A. Bennetti Novelty Co.*, 13 T. C. 1072; *Farry*, 13 T. C. 8; *Latimer-Looney Chevrolet, Inc.*, 19 T. C. 120.

The record shows that the taxpayer in the case at bar did not offer proof dehors the stipulation because its counsel understood that there was no dispute as to the facts. At the pretrial conference, Judge Weinfeld had urged Government counsel to stipulate the facts in order to avoid unnecessary expense to the Government. He said:

"Why should the Government be subjected to the payment of witness fees, in case the Government loses? The facts are not substantially in dispute." (R., Vol. I, p. 45).

This Court has held repeatedly that a taxpayer may not be deprived of a fair opportunity to present evidence and argument on every issue raised against him in a tax case.

In *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, this Court said, at p. 206:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

In *Helvering* v. *Salvage*, 297 U. S. 106, this Court affirmed a judgment of a Court of Appeals which reversed a decision of the Board of Tax Appeals sustaining an income tax deficiency against a taxpayer on the ground of estoppel which this Court said was not properly before the Board because it had not been pleaded as an affirmative defense.

In *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, this Court refused to consider a point which had not been raised in the notice of income tax deficiency or in the proceedings before the Board of Tax Appeals or the Court of Appeals.

In *Helvering* v. *Gowran*, 302 U. S. 238, this Court held that the Commissioner was entitled to raise in the Court of Appeals a new issue which had not been raised before the Board of Tax Appeals, but the case was remanded to the Board to allow the taxpayer "the opportunity to establish before the Board additional facts which would affect the result." There had not been in the *Gowran* case any stipulation or concession which was inconsistent with the new issue which the Commissioner was permitted to raise.

In *Helvering* v. *Wood*, 309 U. S. 344, the Commissioner was denied the right to raise in this Court a new issue which had not been raised before the Board of Tax Appeals and reliance on which had been disclaimed by his counsel in the Court of Appeals. This Court said at p. 349: "To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

This entire subject was fully reviewed by this Court in *Hormel* v. *Helvering*, 312 U. S. 552. There the Commissioner was permitted to raise the same new issue which he had been forbidden to raise in *Helvering* v. *Wood*, *supra*, because it did not appear that he had expressly waived it. However, this Court remanded the case so as to accord the taxpayer an opportunity to offer evidence on the new issue, "however remote may be his chance."

It is respectfully submitted that the decision of the trial court in this case and its affirmance by the Court of Appeals are in conflict with the decisions of this Court referred to above.

In the Court of Appeals, the Government's counsel on appeal denied that the Government's trial counsel had stipulated or conceded that the leased coolers were capital assets while out on lease. The formal stipulation was that the Government conceded that the leased coolers, "while out on lease * * * were not included in plaintiff's inventory", but "were subject to depreciation, which depreciation was taken by the plaintiff and allowed by the defendant." (R., Vol. I, p. 27).

If there could be any real doubt as to the meaning of that stipulation, it was entirely removed by Government

counsel at the trial, in the following colloquy with the District Court:

> Mr. Lacina: * * * once they were put out on lease, they took them out of inventory and carried them in their capital account for the purpose of obtaining a depreciation credit.
>
> The Court: You admit that was perfectly proper?
>
> Mr. Lacina: As I understand it, that is proper procedure. And while it is out on lease they are permitted to claim a depreciation credit. However, the Government contends that when a cooler is sold, the lease terminates and it is no longer a capital asset, it is an item in business, it is an item which is subject to sale.
>
> There is a line of demarcation between the termination of the lease and the sale. It is no longer in the capital inventory. When it is sold, it becomes —pardon me, it is no longer a capital asset, it belongs in inventory when it is sold, and at that point it ceases to accumulate depreciation and should be treated as an item in inventory, and that is the crux of this whole case." (R., Vol. I, p. 44).

Government counsel on appeal argued also that although it was conceded that the leased coolers were not includible in inventory and were subject to depreciation allowances, the applicable provision of the Internal Revenue Code, Section 117(j), required the plaintiff to prove also as a fact that they were not held primarily for sale to customers. It is quite true that some kinds of depreciable property not includible in inventory may nevertheless be held primarily for sale, but that is never true as to fungible assets such as this taxpayer's coolers, which if held primarily for sale must be kept in an inventory account, as the Commissioner himself ruled in this case.

Therefore, while concededly not properly in inventory such coolers could not be deemed to have been held primarily for sale.

The Government should not be permitted after the trial to whittle down the plain and ordinary meaning of its stipulation and concession as to what the Commissioner had properly determined as to the status of the leased coolers while out on lease. As the Eighth Circuit Court of Appeals said in *Arkansas Valley Sugar Beet & Irrigated Land Co.* v. *Ft. Lyon Canal Co.*, 173 Fed. 601, at page 603, "A stipulation to settle controversies, or to assist a court in deciding them, ought not to be discouraged by a narrow and unreasonable construction, that would defeat the manifest intention of one of the parties, acceded to by the other."

2. The decision of the Court of Appeals, affirming the judgment of the District Court on an issue which had been conceded at the trial, is in conflict with decisions of other Courts of Appeal, which have held tax litigation within the bounds of the Commissioner's determination and stipulations and concessions made at the trial by the Government.

In *Wiget* v. *Becker*, 84 F. 2d 706 (C. A. 8), a judgment against the taxpayer was reversed because it was in conflict with testimony offered by the Government and an admission of Government counsel at the trial. The Court said:

> "A judicial admission has been held to be conclusive on the party by whom it was made, or to whom it is attributable."

In *Lenox Clothes Shops* v. *Commissioner*, 139 F. 2d 56 (C. A. 6), a judgment against a taxpayer was reversed

because it conflicted with a concession made at the trial by Government counsel. The Court said:

> "We gather from the record that respondent was represented by able counsel and under such circumstances respondent is required to observe the admissions and stipulations of counsel of record during the trial of a case, just as counsel for any other litigant."

3. If the court below had upheld the Government's contention in the trial court that, although a leased cooler was a non-inventory investment asset while out on lease, the decision to sell it transformed it into an inventory asset, its decision would have conflicted squarely with the decision of the Third Circuit in *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129, which the Government did not request this Court to review. That point cannot, therefore, be urged in opposition to this petition for a writ of certiorari. Whether or not this Court would consider the point on a review of this case at this stage, the decision of the Third Circuit is further reason for granting the writ prayed for, as it demonstrates that the error of the court below in refusing to decide the case on the only issue joined in the trial court was highly prejudicial to the petitioner.

In the *Philber* case, the taxpayer was engaged in the business of renting motor vehicles for terms substantially shorter than their useful life. When a lease ended the vehicle was sold if it could not be re-leased profitably. The Court overruled the Commissioner's contention that since the vehicles were held for the dual purpose of leasing and selling they must be deemed to have been inventory assets. It also overruled an alternative contention that the mere

selling of a vehicle transformed it into an inventory asset. The Court said:

> "The final sale of the property can only be decisive if the taxpayer's business was operated with the final gains from the sale of such vehicles as a determining business purpose." (p. 131).
>
> "The acquisition and disposition of equipment was an essential aspect of the business of renting equipment and the officers of the taxpayer were aware that property acquired must ultimately be disposed of. Standing alone, such disposition, even though a necessary and frequent element of taxpayer's business, cannot be considered inconsistent with the conduct of a rental business or make the sale factor a dominating business purpose of taxpayer." (p. 132).
>
> "We cannot subscribe to this 'alternative ground'. To do so would make for judicial nullification of Section 117(j).
>
> "The essence of the Tax Court's alternative ground is that property changes character merely by the fact of its being exposed for sale. We agree with the taxpayer that such a concept is neither logical nor reasonable." (p. 133).

The same result was reached in the Tax Court cases cited above, p. 7, which involved taxpayers engaged in a dual business of renting and selling, as was the petitioner here.

Conclusion.

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Court of Appeals in this case, in order that the issue on which the case was tried may be determined with due regard to the

stipulation and concession of the Government, or a new trial may be ordered to accord the petitioner an opportunity to introduce evidence in lieu thereof.

April 15, 1957.

Respectfully submitted,

ROLLIN BROWNE,
PAUL VAN ANDA,
Counsel for Petitioner,
30 Broad Street,
New York 4, N. Y.

Appendix.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 228—October Term, 1956.

(Argued February 8, 1957 Decided February 25, 1957.)

Docket No. 24175

S. E. C. CORPORATION, formerly known as Canaday Cooler Co., Inc.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

CLARK, CHIEF JUDGE, MEDINA, CIRCUIT JUDGE, and SMITH, DISTRICT JUDGE.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, Judge.

S. E. C. Corporation appeals from the dismissal, D. C. S. D. N. Y., 140 Supp. 717, of its action for refund of alleged overpayments in income taxes for 1947 and 1948, in holding as ordinary income, and not capital gains, under I. R. C. 1939, §117(j), the profits realized from used water,

beer, and frosted food coolers rented and then ultimately sold to customers.

ROLLIN BROWNE, of Satterlee, Browne, & Cherbonnier, New York City (Irving Levine, New York City, on the brief), for plaintiff-appellant.

MIRIAM R. GOLDMAN, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), for defendant-appellee.

PER CURIAM:

Affirmed on the opinion of District Judge Palmieri, D. C. S. D. N. Y., 140 F. Supp. 717.

(Judgment of 2nd Circuit Court of Appeals filed on February 25, 1957.)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 937

S.E.C. CORPORATION, FORMERLY KNOWN AS CANADAY COOLER CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and findings of the District Court (R. Vol. I, 30-38) are reported at 140 F. Supp. 717. The *per curiam* opinion of the Court of Appeals, affirming the opinion below (R. Vol. II, 10a-11a), is reported at 241 F. 2d 416.

JURISDICTION

The judgment of the Court of Appeals (R. Vol. II, 12a) was entered on February 25, 1957. The petition for a writ of certiorari was filed on April 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the record warrants the District Court's conclusion, affirmed by the court below, that property sold by taxpayer was held primarily for sale to customers in the ordinary course of its business, and that consequently the sales profits were taxable as ordinary income rather than as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Sec. 115(b), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), * * * or real property used in the trade or business of the taxpayer.

* * * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held

by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts, as stipulated (R. Vol. I, 25-28) and as found by the District Court (R. Vol. I, 35-37), may be summarized as follows:

The taxpayer, a Delaware corporation, during the fiscal years 1947 and 1948 here involved, and during prior and subsequent years, has been engaged in the business of leasing and selling water coolers, frosted food coolers and beer coolers. This action was brought to recover taxes paid on profits assessed as ordinary income de-

rived from the sale of used coolers which were out on lease to taxpayer's customers. The taxpayer contended that it was entitled to treat these profits as capital gains. (R. Vol. I, 35-36.)

The taxpayer advertised its coolers as available for either sale or rent. When coolers were acquired, they were all put into the taxpayer's inventory at cost and coolers that were subsequently leased were in no way segregated. Some coolers were sold directly from inventory and others were put out on lease under agreements generally providing for monthly payments and three year terms. When the coolers were rented they were taken from the inventory account and depreciation was computed thereon. (R. Vol. I, 27, 36.) While on lease the coolers were offered for sale to lessees. At the end of the rental periods, depreciation on coolers still unsold ceased and coolers were taken back into inventory at their depreciated cost. Although coolers sold while out on lease were not physically taken back into inventory prior to sale, taxpayer's books were adjusted to give such coolers a depreciated inventory basis for the purposes of determining profit or loss on the sale. (R. Vol. I, 36.)

During 1947, taxpayer leased 4130 coolers and sold 145 coolers, 85 of which were sold while under lease. During 1948, 4321 coolers were leased and 235 coolers were sold, 121 of which were sold while under lease. Thus, during the two taxable years in question a total of 380 coolers were sold and of this amount 206 or 54.2% were sold while under lease. (R. Vol. I, 11, 37.)

The taxpayer was engaged in the unified enterprise of renting and selling coolers, and whether any particular cooler was rented or sold depended on which type of transaction was more profitable to the tax-

payer at any given time. (R. Vol. I, 37.) The coolers in issue were an indistinguishable part of the stock in trade which the taxpayer held essentially for both sale and lease to customers, and they were in no manner segregated from the rest of the stock in trade. (R. Vol. I, 34.)

The District Court found that the coolers sold were held primarily for sale to customers in the ordinary course of taxpayer's business of leasing and selling coolers (R. Vol. I, 30-35), and accordingly entered judgment in favor of the United States (R. Vol. I, 38). The Court of Appeals affirmed *per curiam* on the opinion below. (R. Vol. II, 11a.)

ARGUMENT

The question presented is one of fact, and the court below correctly affirmed the District Court's determination. There is no conflict and no occasion for further review.

1. Section 117(j) of the Internal Revenue Code of 1939, *supra*, pp. 3-4, accords preferential capital gain treatment to gains from sales of depreciable business property held for more than six months, but expressly excepts from its coverage property "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". Whether particular property falls within the excepted category presents a question of ultimate fact in each case, no one factor being decisive, and the trial court's conclusion should not be disturbed unless clearly erroneous. Among the relevant factors to be considered and weighed are the intention of the taxpayer in acquiring the property, frequency and continuity of sales, whether the property was advertised or otherwise

promoted for sale, and any other circumstances bearing upon whether the sales are in furtherance of the taxpayer's business.[1] This Court has declined to review similar cases which presented like questions of a factual nature.[2] Because of the inappropriateness of Supreme Court review in cases of this kind, the Government has refrained from seeking certiorari where the decision has been adverse to it.[3] There is no more occasion for further review of this case than of others involving the same question.

2. The record amply warrants the District Court's conclusion that the property here involved—coolers sold while out on lease—was held by the taxpayer in its business primarily for sale to customers. Taxpayer acquired coolers both for sale and for lease, advertised them as available for lease or for sale, disposed of them by sale whenever that method proved

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[1] Cases in the Courts of Appeals involving the question here presented are legion, and they uniformly hold that the question is one of fact. See, *e.g.*, *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263 (C.A. 9th); *Harriss* v. *Commissioner*, 143 F. 2d 279 (C.A. 2d); *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C.A. 10th); *Victory Housing No. 2* v. *Commissioner*, 205 F. 2d 371 (C.A. 10th); *Home Co.* v. *Commissioner*, 212 F. 2d 637 (C.A. 10th); *Dillon* v. *Commissioner*, 213 F 2d 218 (C.A. 8th); *Dougherty* v. *Commissioner*, 216 F. 2d 110 (C.A. 6th); *Winnick* v. *Commissioner*, 199 F. 2d 374 (C.A. 6th); *Cohn* v. *Commissioner*, 226 F. 2d 22 (C.A. 9th); *Homann* v. *Commissioner*, 230 F. 2d 671 (C.A. 9th); *Pacific Homes* v. *United States*, 230 F. 2d 755 (C.A. 9th).

[2] See, *e.g.*, *Harry Slatkin Builders* v. *Commissioner*, *supra*; *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5th), certiorari denied, 342 U.S. 829.

[3] See, *e.g.*, *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C.A. 3d); *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th); *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5th); *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (C.A. 3d).

more advantageous, made frequent sales of both new and used coolers, and did not segregate the coolers in question from others sold. (R. Vol. I, 33-34, 36-37.)[4] On the basis of these undisputed facts, and other relevant factors discussed in its opinion, the District Court was fully justified in concluding that "All the evidence presented indicates that the coolers in issue were an indistinguishable part of a stock in trade held essentially for both sale and lease to customers". (R. Vol. I, 34) Under familiar rules governing the scope of judicial review of the trial court's factual determination, the court below was equally justified in sustaining its decision. Both courts below having decided the factual issue against taxpayer, their concurrent findings are entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51.

3. Taxpayer's principal contention (Pet. 5-11) is that the courts below disregarded concessions made by the Government in the stipulation of facts. The contention is without substance and was properly rejected by both courts below; indeed, it misconceives the issue upon which this case turns. The issue is whether the depreciable property in question was held "primarily for sale" to customers within the meaning of exception clause (B) of Section 117(j), and not (as taxpayer mistakenly assumes) whether it was "includible in the inventory" of taxpayer within the meaning of exception clause (A) of that section. The exception clauses (*supra*, pp. 3-4) are in the disjunctive, *i.e.*, capital gain treatment is denied if either

[4] Taxpayer conceded below that its gains from sales of other coolers, *i.e.*, those never leased and those returned after leases terminated, were properly treated by the Commissioner as ordinary income. (R. Vol. I, 31.)

clause applies. The Commissioner conceded below (R. Vol. I, 27) that the property while out on lease was depreciable and was not included in taxpayer's inventory. He did not concede, as taxpayer claims, that the property was not held primarily for sale.[5] According due effect to the stipulation, the District Court correctly narrowed the issue at the trial by observing (R. Vol. I, 32) that "The issue here arises under the second of these two exceptions", namely, the clause (B) exception relating to property held primarily for sale, and it proceeded to point out that the evidence showed the second exception to be applicable.

4. Taxpayer's assertion of conflict (Pet. 11-12) rests upon its mistaken assumption that the decision below disregards alleged concessions made by the Commissioner. Since there is no warrant for that assumption, cases dealing with the legal effect of admissions by a litigant, relied upon by taxpayer to show a conflict, are plainly inapposite.

Nor is the decision below in conflict with *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C. A. 3d), the only appellate court decision cited by taxpayer involving a question similar to that here presented. The court there recognized that property which is acquired for the dual purpose of leasing and selling may be "held * * * primarily for sale" within the meaning of Section 117(j), but on the record presented held that the taxpayer was engaged solely in the rental business. In that case, unlike this one,

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[5] Indeed, had the Commissioner conceded that the property did not fall within *either* of the exceptions specified in Section 117(j), as taxpayer in effect charges, there would have been no basis for asserting the tax deficiency in controversy and this case would never have arisen.

the taxpayer never purchased the property (trucks) until a leasing arrangement had been made and the type of property purchased was dictated by the particular requirements of the lessee—factors which the court characterized (237 F. 2d at 132) as "critically significant". Other distinguishing features are that the taxpayer there did not carry on sales promotion activities, sales were confined to used rental trucks, and were made through another corporation. Here, on the other hand, taxpayer acquired its coolers both for lease and for sale, advertised them for sale, and sold both new and used coolers. In the words of the District Court (R. Vol. I, 33), "the sale of new and used coolers clearly was an integral part of the plaintiff's business".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HARRY BAUM,
HELEN A. BUCKLEY,
Attorneys.

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